UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

UNITE HERE!

and **Case No. 2-CA-39534**

FEDERATION OF UNION REPRESENTATIVES

Gregory Davis, Esq., Counsel for the General Counsel
Kristin L. Martin, Esq., Counsel for the Respondent
Nathanial K. Charney, Esq., Counsel for the Respondent

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in New York City on June 7 and 8, 2010. The charge and the first amended charge were filed on October 14, and December 23, 2009. A Complaint was thereafter issued by the Director of Region 2 on March 29, 2010 and this alleged as follows:

1. That on or about June 10, 2006, the Federation was recognized by Unite as the collective bargaining representative of certain of the Respondent's employees in the following unit:

> All organizers, business agents, professional employees, education staff, and boycott apprentices who are employed on UNITE HERE's International payroll, excluding clerical employees and those excluded by the National Labor Relations Act.

2. That these parties have maintained a collective bargaining agreement that runs from June 10, 2006 to September 30, 2010 and which contains a grievance and arbitration procedure at Paragraph 4(b).

3. That on or about June 22, 2009 and until October 2, 2009, the Respondent failed and refused to arbitrate any grievances filed pursuant to the aforesaid collective bargaining agreement including the following specific grievances:

(a) The "Automobile Insurance" grievance.

(b) The "Pink Sheeting Dispute"

(c) The "Tax Treatment of Travel Expenses" grievance.

4. That on or about October 2, 2009, the Respondent withdrew recognition from the Federation.

5. That since October 13, 2009, the Respondent has refused to arbitrate outstanding grievances initiated by the Federation.

6. That since on or about July 13, 2009, the Respondent has failed to provide the Federation that following relevant information requested from the Respondent:

For each bargaining unit employee who made a request for automobile and collision insurance since March 8, 2007:

- A copy of each document reflecting or relating to each request for insurance reimbursement made by any bargaining unit employees, including copies of all reimbursement/expense forms and supporting documents that were submitted to UNITE HERE by the employee including invoices and proof of employment payment.

- A copy of each document that relates to or reflects the amount of reimbursement payment made by UNITE HERE to any bargaining unit employee, including copies of all checks or other form of payment.

- A copy of each document that reflects the amount of withholding made by UNITE HERE in connection with each payment that was issued to an employee for insurance reimbursement.

In relation to the refusals to arbitrate certain grievances, the Complaint alleges that these refusals constituted a violation of Section 8(d) as well as 8(a)(5) inasmuch as it is alleged that they are a unilateral modification of the existing contract made without the consent of the Federation.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

Findings and Conclusions

I. Jurisdiction

The parties agree and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. It also is agreed and I find that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

(a) Background

The Respondent is a labor organization which was the product of a merger of two International labor organizations and which thereafter split from that merged entity. The Charging Party is a labor organization that at one time and until fairly recently, represented certain of the employees of the merged union. However, as described below, the Charging Party has continued to represent certain employees of one of the two entities that resulted from the split. But it no longer represents any employees of the Respondent in the previously recognized bargaining unit. This requires a bit of history.

In July 2004, two International unions merged to form UNITE HERE. In relation to the merger, the constitution of the newly created union provided for two Presidents. These were Bruce Raynor (formerly from UNITE) and John Wilhelm, (formerly from HERE). This arrangement proved to be unstable and two factions, one led by Raynor and one led by Wilhelm, sought to gain ascendancy. These conflicts came to a head in late 2008.

In or about February 2009, Bruce Raynor took a faction out of UNITE HERE and disaffiliated from the Respondent. Soon thereafter, this new organization, called Workers United, affiliated itself with the Service Employees International Union. (SEIU). There was, needless to say substantial and complex litigation regarding the attempt to disaffiliate and a number of other matters involving bank accounts, property, etc. Those cases, which are unrelated to the present unfair labor practice charge, were ongoing at the time of the hearing in this case. [1]

I have no opinion regarding the dispute between the Raynor and Wilheim factions. This is described because it is the context in which the events of the present case arose.

In the meantime, in 2005 the Charging Party, (sometimes referred to herein as the Federation or FOUR), received voluntary recognition as the collective bargaining representative of certain employees who were employed on the International Union's staff. These included employees such as business representatives and organizers. (There also were several joint boards of the Respondent that had separate agreements with FOUR).

The Charging Party and the Respondent executed a five year collective bargaining agreement that ran from October 1, 2005 to September 30, 2010. This agreement contained a grievance/arbitration provision at Article 25 which consists of a four step procedure, the last step being arbitration before one of three designated contract arbitrators. Under the terms of the contract, typical or ordinary grievances must be filed in writing at step 1 within 14 days of a dispute's occurrence. Step 2 occurs if the step 1 stage hasn't resolve the matter and this would involve a meeting between a representative of the Charging Party and the Director/Manager of the relevant Department or Joint Board of the Respondent. If no resolution is reached, either party may move the matter to step 3 which then involves the office of the Respondent's President or his designee. It is noted however, that for grievances involving a substantial number of employees or an entire job classification, a grievance can be initiated at the third step and therefore bypass steps 1 and 2. In all cases, the final step in this process is arbitration.

In either August or early September of 2009, employees in the bargaining unit began to discuss the possibility of replacing the Charging Party, (FOUR), with another labor organization. And in this connection, a petition was circulated that stated:

> We, the undersigned, are requesting to be represented by the UNION OF UNITE HERE STAFF (UUH). We no longer are represented by the FEDERATION OF UNION REPRESENTATIVES (FOUR). We want UNITE HERE to recognize our new union, UUHS, as our exclusive bargaining representatives and to continue our current collective bargaining agreement under our new union.

[1] From newspaper accounts, it seems that there has recently been a settlement of at least some of the disputes between the two remaining labor organizations.

On September 15, 2009, the above described petition was sent to the Respondent and it seems that somewhere around 80% of the bargaining unit employees signed it.

On October 2, 2009, the Respondent, by John Wilheim, simultaneously withdrew recognition from the Charging Party and recognized the new union.

On October 5, 2005, the Respondent and the new organization, UUHS, agreed to continue the existing collective bargaining agreement that was in effect between the Respondent and FOUR.

In addition to the charge in this case, (2-CA-39534), filed on October 14, 2009, the Charging Party also filed unfair labor practice charges against UNITE-HERE and UUHS. These alleged that the Respondent unlawfully withdrew recognition from FOUR and that the Respondent had illegally granted recognition to UUHS. However, by letter dated February 26, 2010, the Charging Party withdrew these contentions that were alleged in Case Nos. 20-CA-39674 and 2-CB-22386.

Thus, while UNITE HERE was in the process of splitting into two entities, the Charging Party was in the process of being replaced by another labor organization, at least with respect to those employees employed by what remained as the entity called UNITE HERE.

(b) The General Counsel's contentions

As noted above, the General Counsel posits that over a period of time, the Respondent has, in violation of Section 8(a)(1) and (5) and Section 8(d) of the Act, unilaterally modified the collective bargaining agreement with the Charging Party by failing and/or refusing to arbitrate three separate grievances.

Because the Board has held that a Respondent's refusal to arbitrate a particular grievance or class of grievances is not by itself a unilateral change or modification of a collective bargaining agreement,[2] the General Counsel's theory must rest on the premise that through a series of refusals, the Respondent has not simply exercised its legal prerogative to argue that a particular grievance may not be arbitral, but that it has gone further and effectively "abrogated" or "repudiated" the contract's arbitration clause. [3]

The General Counsel also asserts that in relation to one of the grievances, the Respondent violated the Act by failing to furnish relevant information. In this regard, the General Counsel only has to establish that the information was arguably relevant to an evaluation of and/or the processing of the grievance that would be arguably cognizable under the terms of the collective bargaining agreement. See for example, *The New York Presbyterian Hospital.* 354 NLRB No. 5

Given that all of the alleged violations arise out of specifically alleged contract grievances, it will be necessary to examine each grievance claim that is the predicate for the General Counsel's theory.

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[2] See for example, *Velan Valve Corp.*, 316 NLRB 1273 (1995); *Xidex Corporation*, 297 NLRB 110, ((1989); and *Cherry Hill Textiles*, 309 NLRB 268, (1992).

[3] See for example, *Paramount Potato Chip Co*., 252 NLRB 794, 796-797 (1980) and *Indiana & Michigan Electric Co*., 284 NLRB 53, 54 fn. 7 (1987).

(i) The Tax/Travel Expense Grievance

Barry Levy, who is the attorney for the Charging Party, testified that he was advised that at least one member of the bargaining unit who was assigned to a long term organizing campaign away from home, had received a W2 form from the Respondent that listed her travel and hotel expenses as ordinary income and thereby increased her gross salary for tax purposes to well over a $100,000.

On June 4, 2009, Levy sent a letter to one of the three contract arbitrators, (Howard Edelman), requesting a hearing. He did this notwithstanding the fact that the Charging Party had not presented this grievance at any of the first three steps of the contract's grievance procedure. The letter stated in substance:

> On behalf of FOUR, I am writing to request that you set up a hearing to resolve a dispute between FOUR and UNITE HERE concerning the manner in which UNITE HERE has elected to tax travel related expenses (e.g. per diem and hotel expense), that are paid to or on behalf of members who work away from home on organizing campaigns. The lead grievant member is Wilhelmina D. Roberts and there is a least one other member who we will identify in the next couple of days. FOUR is requesting a declaration of rights under the agreement, a direction of future compliance as well as an award making whole each of the members who have been improperly paid since the date the most recent CBA was adopted.

By letter dated July 30, 2009, Levy sent another letter to arbitrator Edelman. After citing his June 4 letter, he went on to state:

> In response to that letter, you forwarded a letter proposing dates in October for a hearing in this matter to myself and Brent Garren. Mr. Garren is no longer employed by UNITE HERE and I am not certain who is presently serving as general counsel for UNITE HERE. As a result, I am copying Ms. Martin as well as Mr. McCaffrey who is the Director of Human Resources for UNITE HERE so that they can direct this correspondence to the appropriate person.

By e-mail dated August 31, 2009, Martin advised Levy that Richard McCraken is the General Counsel of UNITE HERE and that he would be handling the matter.

In an e-mail dated September 1, 2009, Levy offered November 12, 2009 as a hearing date for arbitration. And in response to an e-mail from the Arbitrator dated September 10, 2009, Levy responded that he had not yet heard from UNITE-HERE.

It is not at all clear to me exactly what the tax issue was in this type of situation and I wonder if this was something that should have more appropriately been handled at the local IRS office instead of through contract arbitration.

I also note that the Charging Party's tenure as a party to the collective bargaining agreement was about to end. As noted above, a majority of the employees in the bargaining unit submitted a petition to the Respondent on September 15, 2009 indicating their desire to oust FOUR as their bargaining representative. The Respondent legally withdrew recognition from FOUR on October 2 and recognized another union that became the successor to FOUR. Thus, in relation to the collective bargaining agreement, FOUR ceased being a party to the

contract no later than October 2 and UHHS became the substitute party to that agreement on October 6.

In any event, it seems that the Respondent's counsel never responded to the proposed arbitration date and that is where the matter stood at the time of the hearing in this unfair labor practice case.

Apart from whether the grievance, (which essentially relates to how travel expenses should be treated by the IRS), is even subject to the contract's grievance/arbitration clause, the Respondent's position is that FOUR never filed a written grievance at any of the pre-arbitration steps of the grievance/arbitration procedure as required by Article 25 of the contract. And although Levy asserted that there have been occasions in the past when disputes have gone directly to arbitration, he did not cite any specific examples and such a procedure would clearly be contrary to the explicit terms of the collective bargaining agreement.

Given these facts, I cannot say that the Respondent's position on whether it had an obligation to arbitrate this particular grievance is unwarranted. Indeed, it seems to me that the Respondent is more likely correct in its assertion that proceeding to arbitration on this tax matter would not have been appropriate given the failure of the Charging Party to have filed a proper written grievance in accordance with the procedure set out in the contract.

In light of the above, I therefore conclude that the Respondent did not violate the Act by failing and/or refusing to go to arbitration on this grievance.

(ii) The Privacy Grievance, a/k/a the Pink Sheet Grievance.

It seems that a practice that was derived from HERE before its merger into UNITE HERE was to conduct interviews with various job applicants and/or staff members and memorialize these on memoranda using pink paper. Hence the name pink sheets.

On February 15, 2008, FOUR filed a written grievance at step 3 because it allegedly affecting all employees. This asserted:

> Affected employees have been asked and required to participate in "pink sheet" sessions. The affected Directors, Coordinators and other management staff have disciplined and/or caused undue hardship, stress, low morale and inhibited a distrust level amongst the organizing staff.

At about the same time, former President Raynor brought up this issue at the International Union's Executive Board and offered the testimony of two employees in support of his contention that pink sheeting practices were impinging on employee privacy rights.

The evidence in this case shows that the practice of "pink sheeting" and its alleged effect on privacy seems to have been an inflammatory issue. And the Respondent asserts that it was seized on by Bruce Raynor in support of his contest with John Wilhelm. However, for purposes of this unfair labor practice proceeding, it is my conclusion that whether or not this issue was used for political purposes, this is not relevant if the grievance presented a "colorable claim" under the collective bargaining agreement.

By letter dated December 12, 2008, attorney Levy sent a letter to Arbitrator Edelman requesting that a hearing be set up to deal with the pink sheeting grievance. This request was

followed up by another Levy letter dated December 17, 2008. He indicated that the Employer's practices were continuing.

In a letter dated January 22, 2009, from Levy to Drangel-Ochs, (then a staff attorney for UNITE HERE), he confirmed that the matter would be heard by arbitrator Edelman. He stated that FOUR had no intention of settling the grievance and would likely confirm any award through a judicial proceeding. He stated that FOUR was seeking the following remedies.

> An award directing UNITE HERE … to cease and desist from engaging in any form of pink sheeting activity or similar conduct;
>
> An award directing the imposition of a monetary or other form of penalty associated with any future violations; and
>
> And award directing that UNITE HERE offer re-employment to any employee who resigned their employment as a result of the pink-sheeting activity, with no loss of seniority.

On or about January 26, 2009, John Wilhelm issued a Privacy Memorandum that was distributed to the staff of UNITE HERE. Also on January 26, 2009, co-president Bruce Raynor, issued his own memorandum which, although describing Wilhelm's memorandum as a "good start," went on to criticize the Wilhelm memorandum in some respects.

In a letter dated February 7, 2009, Levy advised the Employer's in-house counsel, Jessica Drangel-Ochs as to what FOUR would like as a settlement of the grievance. He stated that a settlement should have the following elements:

1. UNITE HERE should incur a $5000 penalty for a first violation and that this should be increased by $2500 for each violation thereafter.
2. The arbitrator should retain jurisdiction to allow him to make appropriate award and enforcement (plus counsel fees) in the event that UNITE should violate the agreement in the future or refuse to make the penalty payments.
3. That Frank Lombard and Amelia Frank-Vital are persons who would be reemployed by UNITE HERE with backpay as appropriate.

On February 19, 2009, Kristin Martin wrote to Levy and to the Arbitrator stating that her law firm had been retained by UNITE HERE. She therefore moved to intervene in the pending arbitration case and asked that it be it stayed pending the June 2009 International Union convention.

Nevertheless, on February 20, 2009, a hearing on this grievance opened before the Arbitrator. At this hearing, which was held in New York City, FOUR was represented by Barry Levy and the Respondent was represented by Jessica Drangel-Ochs, who as noted above, was an in-house attorney for UNITE HERE. At the hearing, the parties stipulated that the issue for resolution was as follows:

> Does the Employer violate the collective bargaining agreement by requesting or requiring bargaining unit members to reveal aspects of their personal lives or opinions or the personal lives or opinions of other bargaining unit members as part of their job duties, and if so, what shall be the remedy?

Two witnesses were called by the Charging Party at the arbitration hearing and these were the same two persons who Raynor presented at the earlier Executive Board meeting. Presumably they testified about instances where their privacy was invaded.[4] At the end of the day, the hearing was adjourned to February 26, 2009.

On February 24, 2009, Arbitrator Edelman held a conference call regarding the issues of when the hearing would resume and who would be representing UNITE HERE.

Also on February 24, 2009, Jessica Drangle-Ochs sent a letter to the Arbitrator asserting that Martin's law firm did not represent UNITE HERE and that it had no right to intervene in the proceeding. She asserted that the arbitration hearing should proceed as scheduled.

Faced with these conflicting claims, the Arbitrator, on February 25, adjourned the hearing for a maximum of 30 days to allow "Ms. Martin to seek a stay of these proceedings."

On March 10, 2009, Kristin Martin sent a letter to the Arbitrator advising him that UNITE HERE's General Executive Board had met and decided to retain her firm to represent it in the arbitration case. She enclosed a certified transcript of the General Executive Board meeting that was held on February 26, 2009.

By e-mail dated March 16, 2009, Drangel-Ochs advised the Arbitrator that she continued to be legal counsel and that the hearing should resume. Although noting that Martin's claim to be counsel was based on a resolution passed by the General Executive Board to remove Drangel Ochs and retain Martin's law firm, she argued that Bruce Raynor did not support this resolution "nor does he support this view." Drangel Ochs went on to state:

> This dispute of who represents UNITE HERE at this arbitration stems from the overall dispute concerning the powers of the presidents and the [General Executive Board] under the UNITE HERE Constitution, which is currently the subject of litigation before Judge George B. Daniels in the Southern District of New York…. The Raynor faction of the dispute would argue that the [General Executive Board's] actions are without authority. Given the pending litigation in federal court, we do not believe it is appropriate for you to decide the issue. The internal UNITE HERE Legal Department has historically represented UNITE HERE in its relationship with FOUR. We should continue to do so. As discussed in our letter to you of February 24, the undersigned has had difficulty in preparing a defense in this matter. We would request that you direct Ms. Martin to assist the undersigned in seeking witness cooperation.

In a letter dated March 17, 2009, Martin responded and asserted that Drangel -Ochs was not authorized by UNITE HERE to represent it in the arbitration proceedings and that if she was permitted to appear and represent the employer, "then any resulting award will be invalid." The letter went on to assert that Drangel-Ochs was acting solely on behalf of the Raynor faction and that Raynor has been acting in concert with FOUR on the pink sheet issue for the purpose of embarrassing Wilhelm.

[4] All parties agreed that because their testimony could deal with matters of personal privacy there was no necessity that these pages of the arbitration transcript be included in this record. Therefore, General Counsel Exhibit 17 does not include their testimony.

In an e-mail dated March 23, 2009, arbitrator Edelman stated that he had reviewed the submissions and that in his view, Martin now properly represented UNITE HERE in the matter. He proposed April 20, as a date to resume the hearing.

On April 6, 2009, Martin advised the Arbitrator that she would check her schedule with respect to the April 20 date. She further advised that Drangel-Ochs no longer worked for UNITE HERE.

By letter dated April 8, 2009, Martin advised the Arbitrator that she could not accept April 20 as a resumption date. She indicated that she understood that Levy intended to call an additional witness and that she wanted to re-cross the first two witnesses presented by FOUR. She also suggested that the hearing be held in Phoenix Arizona because most of the alleged incidents occurred there and because that is where most of the witnesses lived. (Martin lives in San Francisco). She also objected to testimony being taken by telephone because this "case will require the Arbitrator to make very important credibility determinations."

On April 9, 2009, Martin sent an e-mail to Levy inviting a phone call if he wanted to talk about hearing logistics.

On April 16, 2009, there was a conference call between the Arbitrator, Levy and Martin. The subject was her request to hold the hearing in Arizona. The arbitrator then suggested that Levy and Martin explore whether a settlement was possible. Stating that he would be out of the country through May 22, the arbitrator indicated that the hearing would probably be held in June. During this conference call, Levy stated, in effect, that the people whom FOUR represented in the South did not care much about the arbitration, but that people in the Northeast did.

On April 17, 2008, Martin e-mailed Levy to request that he send her any correspondence between Levy and Drangel-Ochs because Martin seemed to be missing some of the letters. Martin went on to say that she would be available in the following week if he wanted to talk about a settlement.

On April 20, Levy replied and sent by e-mail, a set of correspondence between himself and Drangel Ochs. Levy stated that he would be available on Tuesday or Wednesday to talk.

On April 22, 2009, Levy and Martin had a phone conversation and discussed a possible settlement. Levy outlined FOUR's ideas regarding a settlement.

On June 19, 2009, the arbitrator held a conference call with Levy and Martin. Both Martin and Levy agree that Levy conveyed the message that because Raynor no longer was employed by UNITE HERE, he no longer was an impediment to a settlement. During the meeting, the arbitrator asked Levy if as a practical matter, there was anyone who was looking for reinstatement. Levy said no. There was a discussion about the privacy policy that Wilhelm had issued in January 2009 and Levy said that he had never read the entire policy statement and wanted to make sure that it had some kind of enforcement procedure. Levy stated that he didn't want to rewrite Wilhelm's privacy memorandum. Martin said that she would send him the entire document which she did on June 22.

Subsequent to the June 19 conference call and Levy's receipt of the privacy memorandum on June 22, there were no further communications between the parties and neither asked the arbitrator to resume or reschedule the hearing. According to Levy, he made a couple of phone calls to Martin's California office and because she was out, he states that he

left messages that she should return his call. He testified, however, that he left these messages with some unknown, unnamed and unidentified woman who answered the phone. Levy did not send Martin any letters, e-mails or faxes and he never communicated with the arbitrator in writing or otherwise to indicate that FOUR wanted to resume the hearing on the privacy/pink sheet issue.

The issue here is not whether FOUR abandoned the grievance. Maybe it didn't. The issue is did the Respondent, UNITE HERE, as alleged, refuse to go forward with the arbitration?

There is simply no credible evidence that had FOUR made any effort at all to resume the hearing that UNITE HERE would have refused. All of the evidence in this case shows that Martin who was the Respondent's counsel, was prepared to litigate the matter before the arbitrator and was involved in discussion to do just that. The evidence shows that Levy, on behalf of FOUR, was mindful that a resumption of the hearing, especially if the arbitrator agreed to hold it where the witnesses were located, would be costly to his rather small client, some of whose members by this time were not all that interested in the subject matter of the grievance. Moreover, as both Levy and Martin agree that Levy stated that a settlement would be more likely because Bruce Raynor was out of UNITE HERE, this does lend some credence to the Respondent's assertion that this grievance, even if it had some merit, was being pursued by FOUR in alliance with Raynor as a means to embarrass his opponent, Wilhelm.

The bottom line here is that the General Counsel has not shown that UNITE HERE has refused to process or participate in the arbitration of this grievance. Since this is the allegation, I conclude that it does not have merit and that it should be dismissed.

(iii) The Automobile Insurance Grievance

The collective bargaining agreement contains a number of provisions, contained in Article 22, relating to the use of automobiles. Relevant to the present case is section 22. 6 which states:

> UNITE HERE shall provide reimbursement for liability and collision insurance for all vehicles used regularly for UNITE HERE business, up to a maximum of $1,800 per calendar year effective January 1, 2006, based on submission of proof of adequate insurance in accordance with the UNITE HERE standard.

On July 31, 2007, FOUR filed a grievance asserting that the Respondent violated the terms of the contract by treating and reporting automobile reimbursement insurance amounts as taxable income. The Charging Party's contention was that UNITE-HERE improperly withheld monies for tax purposes from employees who had obtained car insurance reimbursement. When no resolution was reached at step 3, the matter was submitted to Arbitrator Robert M. Herzog, one of the three permanent contract arbitrators.

On December 8, 2008, a hearing was held before the arbitrator. The position of FOUR was that taxes on reimbursed auto insurance should not be withheld, but if they were, then the amount of the reimbursement should compensate for the amount withheld so that employees would not incur any out of pocket expenses. ("Grossing up").

On May 24, Arbitrator Herzog issued an Opinion and Award and concluded as follows:

> 1. UNITE HERE violated the Collective Bargaining Agreement by failing to reimburse employees and treating as taxable income… the expenses they incurred for automobile and collision insurance since on or about March 8, 2007;
>
> 2. UNITE HERE shall cease and desist from shifting tax liability for … insurance reimbursement onto bargaining unit members, until such time the parties may negotiate otherwise;
>
> 3. UNITE HERE shall take whatever remedial steps necessary to implement #2 above, such as the utilization of the "grossing up" system;
>
> 4. UNITE HERE shall make bargaining unit members whole for all monies already withheld from … paychecks attributable to automobile insurance reimbursement tax withholdings since UNITE HERE implemented said automobile reimbursement tax withholding;
>
> 5. The Arbitrator retains jurisdiction should a dispute arise in the implementation of this award.

On June 4, 2009, Levy sent a letter to the Respondent suggesting a meeting to work out the implementation of the Arbitration Award.

On June 22, 2009, Levy wrote another letter after not receiving a response to his first letter.

On July 13, 2009, Levy, after stating that he had still not received a response, made a request for the following information.

> A copy of each document reflecting or relating to each request for insurance reimbursement made by any bargaining unit employees, including copies of all reimbursement/expense forms and supporting documents that were submitted to UNITE HERE by the employees, including invoices and proof of employment payment.
>
> A copy of each document that relates to or reflects the amount of reimbursement payment made by UNITE HERE to any bargaining unit employee, including copies of all checks or other forms of payment.
>
> A copy of each document that reflects the amount of withholding made by UNITE HERE in connection with each payment that was issued to any employee for insurance reimbursement.

On July 31, 2009, Levy sent a letter to arbitrator Herzog setting forth FOUR's unsuccessful attempts to meet and discuss with the Respondent the implementation of the award. He also indicated that he had requested the information described above. In conclusion, Levy stated:

> At this point, we would request that you direct a telephone conference so that we can discuss whether UNITE HERE intends to comply with the Award, or whether a further hearing will be necessary….

By an e-mail dated August 25, 2009, Levy wrote to John W. Wilhelm stating;

> I write in a final effort to bring this matter to a negotiated conclusion. Since the decision and award was issued in this matter back in May of 2009, I have sent numerous communications to Mr. McCaffrey seeking to have him participate in a negotiated resolution rather than forcing the matter to a further hearing. Despite several letters and e-mails, he has never responded.

According to Levy, he received no response to this e-mail and he requested that the Arbitrator send out a Notice of Hearing. This was done on September 22, 2009 and a hearing was scheduled to commence on October 19, 2009.[5]

By letter dated October 2, 2009, Wilhelm wrote to FOUR and stated that UNITE HERE was withdrawing recognition from that labor organization.

On October 7, 2009, in preparation for the hearing scheduled for October 19, Levy issued a subpoena to UNITE HERE. This demanded that the Respondent bring to the hearing the documents requested in Levy's July 13, 2009 letter.

By letter dated October 13, 2009, the Respondent's new counsel wrote to the Arbitrator and stated;

> FOUR no longer represents any employees of UNITE HERE… Therefore, FOUR has no authority to call for or conduct an arbitration proceeding on behalf of UNITE HERE employees. For the same reason, UNITE HERE respectfully submits that you do not have any jurisdiction to consider any claims made by FOUR on behalf of UNITE HERE employees, either on October 19 or any other time. Therefore, UNITE HERE will not appear at any such hearing and will not produce any evidence.

In an e-mail dated October 13, 2009, arbitrator Herzog stated in substance, that inasmuch as he had not been served with a Court issued Stay Order, he intended to proceed with the arbitration hearing as scheduled for October 19.

By letter dated October 14, 2009, UNITE-HERE's new counsel wrote to the arbitrator and stated:

> UNITE HERE has not submitted to your jurisdiction and you may not proceed with any hearing concerning any claim against UNITE HERE without its consent or an order from a court of competent jurisdiction requiring it to submit to arbitration. Such an order would not be appropriate given the lack of any collective bargaining relationship between the Federation of Union Representatives and UNITE HERE…. Because UNITE HERE does not consent and there is no order, UNITE HERE will not participate in any hearing you hold. For the same reason, it will not bear any part of the cost of such hearing, including the cost of a hearing room.

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[5] It is likely that in the summer of 2009, there was activity amongst bargaining unit employees to oust FOUR and replace it with another union. My guess is that the Respondent, being aware of this activity, chose to wait it out and see if FOUR might cease being the bargaining representative. I note that the petition to oust FOUR was received by UNITE-HERE on September 15, 2009 and this was before the Notice of Hearing was issued.

As far as I know, the arbitration hearing scheduled for October 19, 2009 was not held.

Thereafter, on May 20, 2010, FOUR filed a petition in the United States District Court for the Southern District of New York to confirm the May 24, 2009 Award issued by arbitrator Herzog. As of the time of this unfair labor practice hearing, the Respondent had filed an Answer to FOUR's Complaint and the matter was assigned to a Judge who ordered briefs to be filed on the respective Motions for Summary Judgment. In its answer, UNITE HERE asserted essentially that **(a)** there was no collective bargaining agreement between it and FOUR, **(b)** that FOUR no longer represented any employees of UNITE HERE and **(c)** that the matters arose out of "duties set out in the National Labor Relations Act for which the primary avenue of redress is administrative proceedings before the National Labor Relations Board."

There are a number of matters to be considered in order to resolve the legal issues raised by this set of facts.

The issue before me is not the merits of the underlying grievance. There is no contention that the Respondent, in violation of Section 8(a)(5) or 8(d), modified or unilaterally changed the contract when it treated reimbursements of automobile insurance as taxable income. Indeed, that underlying dispute involves the interpretation of the contract which does not explicitly require the Respondent to treat reimbursements as non-taxable income or to "gross up" the amount of the reimbursement to account for the amounts withheld. The basis of the Award seems to be that this was a variance from past practice. I cannot say that the Award was unreasonable or that it was inconsistent with the terms of the collective bargaining agreement.

However, it is not necessarily an unfair labor practice for an employer to refuse to comply with a particular arbitration award or to take the position that a particular grievance is not subject to the arbitration provision of a contract. The normal remedy for such positions under Section 301 of the Act is either to file a lawsuit to confirm an Award already issued or to file a lawsuit to compel the Employer to go to arbitration in relation to a particular grievance that remains unresolved. Although one could say that an employer modified a contract without consent if it completely refused to be bound by an arbitration provision in a collective bargaining agreement, neither the ad hoc refusal to arbitrate a particular grievance nor a refusal to comply with a particular award, in the absence of judicial confirmation, rise to the level of an 8(d) modification of the existing contract.

This particular grievance arose out of transactions that took place during the life of the collective bargaining agreement and *before* FOUR was ousted as the bargaining representative. Therefore, at the time of the initial arbitration hearing and the issuance of the Award, FOUR was the proper party to those proceedings.

Given the fact that FOUR was still the duly designated bargaining representative at the time that the Award was issued, its July 13, 2009 letter requesting information would, in my opinion, be a request for information that would clearly be relevant for implementing the Award. As such, I would conclude that the Respondent's failure to furnish this information to the Charging Party, *at the time it was requested*, constituted a violation of Section 8(a)(1) and (5) of the Act.

Nevertheless, by the time that FOUR requested a new hearing before Arbitrator Herzog, a majority of the employees had sent a petition to the Respondent stating their desire to replace FOUR with another Union. And the hearing that was scheduled to take place on October 19,

2009 was scheduled to occur *after* recognition had lawfully been withdrawn from FOUR and given to UHHS. Therefore, if that hearing were to have taken place, FOUR would no longer have been a party to the collective bargaining agreement and another union would have become its successor. As such it clearly would have been anomalous and contrary to Section 9(a) of the Act, for the Employer to be simultaneously dealing with two separate labor organizations with respect to a single unit of employees.

No later than October 2, 2009, FOUR had been removed as the authorized bargaining representative of the employees in the affected bargaining unit and it no longer was a proper party to a collective bargaining agreement with the Respondent. Once it was superseded by UHHS, it seems to me that the Respondent has a better than average claim that any further arbitrations with FOUR, on any subject at all, can no longer be legally permissible. There is no indication that the successor union attempted to intervene in the grievance/arbitration proceeding and there is no indication in this record, that the successor union was interested in pursuing this claim.[6]

In light of the above, it is my conclusion that the Respondent did not violate the Act when it refused to further arbitrate this grievance because FOUR had been replaced as the legitimate collective bargaining representative by another union. In *Arizona Portland Cement Co.*, 302 NLRB 36, 37 (1991), the Board, in substantially similar circumstances held that an employer had no obligation to continue to arbitrate a dispute with a union that had been lawfully replaced by another labor organization. Therefore, I shall recommend that this aspect of the Complaint be dismissed.

Also, having found that in each instance that the General Counsel has failed to establish that the Respondent has repudiated the arbitration provisions of its previous contract with FOUR, I conclude that it has not violated Section 8(a)(1) and (5) in this regard or that it has unilaterally modified the collective bargaining agreement in violation of Section 8(d) of the Act.

Although I have concluded that the Respondent has violated Section 8(a)(1) and (5) by failing to timely furnish certain information to the Charging Party when it was the legally recognized representative of employees, I do not think that it would be appropriate to order the Respondent to now turn over that information to FOUR, as it no longer is the employees' representative. On the other hand, I see nothing untoward in requiring the Respondent to notify its employees in the form of a Board Notice that when their bargaining representative requests information that is relevant to the administration of a collective bargaining agreement, that this is an obligation that it will comply with in the future.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [7]

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[6] I would think that because UHHS was the successor union, it should have been officially notified of the arbitration and court proceedings *as a necessary party* and be given the opportunity to decide for itself how or if it wished to proceed on this issue.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, UNITE HERE, its officers, agents, successor, and assigns, shall

1. Cease and Desist from

(a) Refusing to furnish to a union representing its employees, information relating to the processing of grievances or the administration of a collective bargaining agreement.

(b) In any like or related manner interfering with, restraining or coercing employees in the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facilities, copies of the attached notice marked "Appendix ." [8] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since July 13, 2009.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., August 10, 2010.

_____
Raymond P. Green
Administrative Law Judge

[8] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.
To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to furnish to the recognized collective bargaining representative of our employees, information relevant to the grievance/arbitration process or for the administration of a collective bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the rights guaranteed them by Section 7 of the Act.

UNITE HERE!
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614
New York, New York 10278-0104
Hours: 8:45 a.m. to 5:15 p.m.
212-264-0300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0346.